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RL:0263

HB 125-77, HB 368-77, HB 586-77,
HB 1998-78, HB 1999-78, HB 2349-78, HB 2425-78,
HB 2800-78 and HB 2890-78

RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

Statement for the
House Committee on Ecology and Environmental Protection
Public Hearing, 21 February 1978

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The nine bills identified above all relate to the State Environmental Impact Statement System and propose amendments to HRS Chapter 343, the Environmental Impact Statement Act. The Environmental Center has recently reported on a study of the "Hawaii State Environmental Impact Statement System" undertaken at the request of the Office of Environmental Quality Control (D. C. Cox, P. J. Rappa, and J. N. Miller, Environmental Center SR:0019, 187 pp, January 1978). HB 2890-78 reflects the suggestions and recommendations in the Center's report. In reviewing the first three bills listed, which were held over from the 1977 Legislative Session, we will simply summarize comments made last year by the Center on them. In reviewing the six bills newly introduced this year, we will draw on the Center report, and in the case of HB 2890-78, call attention to some further amendments and revisions of the proposed amendments of HRS 343 desirability has come to our attention since the Center report was published. This statement does not reflect an institutional position of the University.

HB 125 (1977)

This bill is essentially identical to HB 2012, HD 1 (1976) which the Environmental Center reviewed earlier (RL:0184). In its review of HB 125 (1977) last year (RL:0194), the Environmental Center pointed out both strengths and weaknesses of the bill. The strong points have all been incorporated in HB 2890-78, and the weakening provisions have been deleted from the latter bill.

For reference, the Center's comments on HB 125 are attached as Appendix A.

HB 368 (1977)

As the Environmental Center commented last year (RL:0194, 8 February 1977, p. 3): "This bill would require EIS's for all actions proposed within a conservation district, regardless of whether they would have significant environmental impacts or not. Since the purpose of an EIS is to identify, analyze, and disclose environmental impacts, there would seem to be no purpose to requiring an EIS for an action unless ensuing environmental impacts might be significant."

More extensive comments on this bill are presented in Appendix B.

HB 586 (1977)

As the Environmental Center commented last year (RL:0194, 8 February 1977, p. 3): "This bill would replace all of the prescriptions in the present EIS Act as to the requirement for private actions. The replacement would be a provision that the counties may determine for which kinds of private actions EIS's will be required. This would allow the counties to determine whether EIS's will be required even in the case of actions which require State approvals. Unless and until the counties adopt the same or more extensive requirements than those now in the Act, neither State nor County agencies would have available for their approval decisions the kinds of environmental information that is provided in EIS's. The bill sets no time limits to County responses. At least in its present form, therefore, its passage would set back the consideration of environmental impacts in the decision-making processes."

More extensive comments on this bill are presented in Appendix C.

HB 1998-78

HB 1998 would amend HRS 343-5 which pertains to the rules and regulations of the Environmental Quality Commission, proposing to substitute the terms "rules" for the present combination of "rules and regulations" of the EQC. We understand that the terms rules and regulations have much the same effect under the law, but the EQC has usefully made a distinction between "rules," which govern its own procedures, and "regulations" which specify how the EIS system is to operate. We suggest that the proposed restriction to "rules" is unwise.

HB 1998 also proposes to amend the prescription that the EQC Regulations include a list of exempt classes of action. Under the amendment, the exemption of any action "that would require the development of water" would be prohibited. To be exempt, actions must not have significant environmental effects. Any water development that significantly affected a water resource would have a significant effect. Hence, the proposed amendment would have little effect.

However, not all water developments or actions requiring water developments are covered by the EIS Act. As an alternative and more effective means of ensuring that additional water developments will be subject to the EIS system, we suggest that HRS 343-4(a) be amended to add, to the categories of action listed in subsection (a)(2): "All actions proposing water developments."

HB 1999-78 and HB 2349-78

The amendments to the EIS Act proposed in HB 1999 are paralleled in part by amendments proposed in HB 2349. Hence, we address the two bills together. HB 1999 would provide the Environmental Quality Commission (EQC) with certain additional powers and responsibilities with respect to the EIS system; HB 2349 would place those same powers and responsibilities in the Office of Environmental Quality Control (OEQC), together with certain powers and responsibilities now resting with EQC.

The present State EIS system is a decentralized one, as is the federal EIS system and the EIS systems of most states. Environmental assessments of projects are prepared by proposing and approving agencies. EIS preparation responsibilities rest on the proposers of the projects. EIS acceptance authority rests with the governor or the mayors in the case of agency projects, and approving agencies in the case of private projects. The principal responsibilities of the EQC are to set up the EIS system through its regulations, to manage the public notification scheme in the system, and to be available for certain appeals.

Both HB 1999 and HB 2349 would provide additional centralization by placing certain powers and responsibilities in either EQC or OEQC. These powers and responsibilities are the following:

- i) Power of approval over all determinations whether EIS's are required for individual projects;
- ii) Responsibility jointly with the proposing agencies for responding to review comments on EIS on agency projects;
- iii) Responsibility for making recommendations as to the acceptability of all agency EIS's;
- iv) Power of acceptance on all applicant EIS's; and
- v) Power and responsibility to consider appeals on determinations as to the acceptability of applicant actions.

Some benefit might result from the greater centralization of authority in the EQC or the OEQC that would be provided by these bills. For example, fewer improper Negative Declarations might be issued, and fewer inadequate EIS's might be accepted.

However, the responsibilities would be quite burdensome on the EQC, on which these powers and responsibilities would be placed under HB 1999. A few statistics will help indicate why. In the two and one-half years since the EQC Regulations took effect, 1011 environmental assessment determinations have been made, resulting in 874 Negative Declarations and 137 EIS Preparation Notices; 74 EIS's have been filed; and 45 EIS's have been accepted. A particular problem would be presented in the case of EIS's on applicant actions. The law allows 60 days between the date of submission of such an EIS and the date when its acceptability must be determined. In the present system, several days may elapse before the EQC Bulletin is published that gives notice that an EIS is available for review, 30 days is allowed beyond the Bulletin publication date

HB 1999-78 and HB 2349-78 (continued)

for the review, and 14 days is allowed beyond that for response to review comments. The EQC would have to meet on a strict semi-monthly schedule to assure that applicant EIS's were not deemed accepted by default. Furthermore, we point out that, while the EQC is appropriately constituted to represent public opinion in matters of subjective judgment, it does not necessarily have the technical competence to evaluate objective aspects of EIS's. The staff of the EQC itself is too small and too lacking in breadth of competence to be much help. The EQC staff could be expanded, but this would result in duplication of strengths in the EQC and the OEQC.

If it is the Legislature's wish to provide the EQC, and not the OEQC, with some additional powers and responsibilities in the EIS system, but not to increase the EQC's staff, an alternative to the provisions of HB 1999 that would not be so burdensome would be to expand the provisions for appeals to the EQC. With such an expansion, any determination that some party considered improper might be brought to EQC's attention for adjudication, without EQC having to consider all assessments and all EIS's.

The EQC may, of course, draw on the competence of the staff of the OEQC, but if it did so in the attempt to exercise the powers and responsibilities here considered, the effects of HB 1999 and HB 2349 with respect to centralization of the EIS system would be essentially the same.

HB 2349 would place these same powers and responsibilities directly in the OEQC which, with its full-time and technically competent director and staff, would be more capable of carrying them out. Subjective questions could be referred by the OEQC to the EQC or to the Environmental Council which is already established to provide for liaison between the OEQC and the public and to advise on subjective aspects of environmental issues.

In addition to the increased centralization that would be provided by HB 1999 and HB 2349, the latter bill would transfer certain powers and responsibilities from the EQC to the OEQC. These relate to:

- i) Receiving EIS's;
- ii) Providing information to the public concerning the availability of EIS's;
- iii) Determining, in case of question, which agency shall be involved with the handling of an applicant's EIS.

If these powers and responsibilities are transferred from the EQC to the OEQC, the EQC will be left with only the power and responsibility to establish and amend the rules and regulations under which the system operates. It would seem sensible in this case to transfer the duty and responsibility with respect to the rules and regulations to the Environmental Council which is the body of citizens appointed by the Governor to advise the OEQC, and to disband the EQC.

HB 1999-78 and HB 2349-78 (continued)

In summary, we believe that there is no way in which the EQC, as now constituted can exercise the centralized powers and responsibilities proposed in HB 1999. The EQC could most nearly exercise these powers and responsibilities by using the staff of the OEQC, but this would have the effect of centralization as proposed in HB 2349. If additional powers and responsibilities are transferred from EQC to OEQC as proposed in HB 2349, the power to establish and amend the rules and regulations under which the EIS system operates might as well be transferred to the Environmental Council, and the EQC might as well be disbanded.

HB 2425-78

HB 2425 would amend HRS 343 to add, to the coverage of the EIS system, i) any water developments of more than 10,000 gpd, and ii) any alterations present or historic taro growing areas.

A number of other bills being considered in this legislative session indicate concerns with the adequacy of water resources. In the light of this concern, coverage of water developments by the EIS system may seem appropriate. We suggest, however, that it would be best not to specify a minimum level of development as a criterion for coverage, but to apply the criterion of the significance of the impact, which is a common criterion for all other actions. The development of 10,000 gpd would only be significant in the case of small water resources. We also suggest that the coverage should extend to significant increases in development, and not merely new developments. We suggest further that the provision, if adopted, should be inserted at the end of the list of types of actions covered on the basis of geographic criteria (subsecs. (A) through (D)) and ahead of the type of actions covered on the basis of an administrative criterion (subsec. E).

We do not believe that alterations of taro lands that are merely historic should be covered by the EIS system. Many historic taro lands were urbanized decades ago, and their coverage by the system would require at least environmental assessment of any further alteration. There is no more point to requiring EIS's on new developments in former taro lands long urbanized than on other urban areas.

The concern with alteration of present taro growing areas might be reflected best, we suggest, by coverage of actions proposing any use of unique agricultural lands, because taro lands are the principal component of these lands.

In our comments on HB 1998 and on HB 2890, we propose that the concerns of HB 2425 be met by the means here suggested.

HB 2800-78

HB 2800 proposes to add a new section to HRS 343 that would require that the impacts of neighboring actions be considered, together with the impacts of the action to which an EIS pertains, in determining the significance of the impacts. The intent of the bill is admirable.

The EQC Regulations already provide that agency actions "shall be treated as a single action when:

- 1) the component actions are phases or increments of a larger total undertaking;
- 2) an individual project is a necessary precedent for a larger project; or
- 3) when an individual project represents a commitment to a larger project"

The purpose of the bill is, thus, at least partially met by the EQC Regulations, and we believe that the regulations could be revised, to meet it further.

The problem with meeting the purpose in the case of applicant actions is that it is not possible to know what neighboring actions are being considered until applications have been made for their approval. To the extent possible, the problem will be reduced by the establishment by the counties of permit-clearing-houses, which will keep track of where developments have been proposed.

The benefit provided by the proposal in HB 2800 would thus be somewhat limited. If this benefit justifies the provision, we have no suggestion how the provision might be made better than in the form of a new section as proposed.

HB 2890-78

As indicated in the introduction to this statement, HB 2890 reflects recommendations and suggestions in an Environmental Center report (SR:0019, January 1978). The rationale for the recommendations and suggestions is indicated in that report. The rationale is most objective in the case of the recommended amendments, and more subjective in the case of the suggested amendments.

We will restrict our discussion here to one feature of HB 2890 that is not in accord with the recommendations in the Center's report, certain alternatives to the amendments proposed in the bill, and certain revisions whose possible desirability was brought to our attention since the Center's report was published. Language reflecting the suggested alternatives, revisions, and additions is proposed in Appendix D.

Findings and purpose

The statement of findings and purposes expressed in the bill reflect statements in previous EIS legislation. However, the statement is included in Section 1 of SB 2890, which would not amend the EIS Act. The Center report recommended that this statement be incorporated in Hawaii Revised Statutes as the first section of Chapter 343. The reason is that the findings and purpose are essential to establish the context in which the significance of environmental impacts and the adequacy of EIS's are to be determined, and access should be provided to the definition of this context equal to the access to the rest of the provisions regarding the EIS system.

We recommend that the bill be revised to incorporate the statement of findings and purpose in HRS 343.

Actions covered by the EIS systemCounty General Plan Amendments

Among the suggested amendments, that which may be most controversial is the amendment of HRS 343-4(a)(E) (which would in the amended version of the Act become HRS 343-4(a)(8)) (p. 5, ls. 6-13). This is the subsection that now includes, within the coverage of the EIS system, any action requiring amendment to an existing county general plan where such an amendment would result in a designation other than agriculture, observation, or preservation, but only if the action were not initiated by the county.

Persons consulted in our study of the EIS system considered that the coverage of county general plan amendments by the EIS system should not depend upon whether or not the amendments were initiated by the county. Either all actions requiring general plan amendments should be covered (if they result in the designations indicated) or none of them should be covered.

HB 2890 would extend the coverage to all county general plan amendments (if they would result in the designations indicated), as was suggested in the Center report. The alternative suggested would be to delete the subsection in question, so that no county general plan amendment would be covered.

HB 2890-78 (continued)

Actions in the Capitol Site

HB 2890 proposes, as the Center report recommended, that actions in the Capitol site be covered by the EIS system. The Capitol site, originally defined in HRS 6-7, is, in the new revision of Hawaii Revised Statutes, defined in HRS 6E-34. The area in question is described as bounded by Richards, Beretania, Punchbowl, and Hotel Streets. However, the rationale for coverage of actions in the Iolani Palace grounds (now HRS 6E-35) which is outside this area, is identical to that for coverage of actions in the Capitol site. We suggest amendment to include actions in the Iolani Palace grounds

Actions in Historic Sites

Actions proposing any use within any registered historic site are now covered by the EIS system (HRS 343-4(a)[(2)(C)](4)) (p. 6, ls. 11-15). We suggest consideration of enlargement of the EIS system to lands adjacent to historic sites.

Actions in Agricultural Land Use Districts

Many persons have recommended to us that actions that would divert agricultural lands from agricultural use should be covered by the EIS system. The Center report recommended, and HB 2890 would provide, that the coverage include: i) actions that propose non-agricultural use of lands designated as "prime agricultural lands" included in the agricultural land use district (HRS 343-4(a)(6)) (p. 7, ls. 4-5). and ii) actions that propose changing the land-use designation of such lands (HRS 343-4(a)(10)) (p. 7, ls. 17-19). It has recently been suggested to us that the coverage should also extend to lands designated as "unique agricultural" lands (such as taro lands). We suggest consideration of this extension of the coverage. An alternative that has been suggested to us and that should be considered is that the criterion for coverage of actions in the agricultural land-use district should not be the nature of the lands on which the actions would take place but the requirement of a special use permit.

Water Developments

Several bills or resolutions introduced in this session of the Legislature indicate concern with the adequacy of water resources and with the effects of additional developments of these resources (e.g. HB 1998, HB 2070, HB 2425, and HB 2071). If there is adequate statewide concern with water resources, we suggest that the EIS system be extended to cover water developments, as indicated in our comments on HB 1998.

Actions with detrimental impacts on natural resources

Several of the bills considered at this hearing indicate concerns with various individual kinds of natural resources. SB 1592, introduced in the Senate, indicates a concern with an additional kind of natural resources--energy resources. It has been suggested that these concerns might be combined in a single subsection including actions that will have significant adverse effects on the natural resources of the state.

HB 2890-78 (continued)

These are some potential problems with so broad a coverage. The question of what is significant would become especially troublesome, particularly in the case of natural scenic resources. The cost of the EIS system might be significantly increased, and the system as presently staffed might be overlooked. We have, therefore, not suggested language that would provide this broader coverage by the EIS system.

EIS terminology

The Center report recommended the adoption of the terminology of "draft EIS" for an EIS as it is submitted for review and "final EIS" for an EIS that has been revised on the basis of review comments and is ready for the acceptance determination. This terminology is used in the federal EIS system, and its adoption in the State system will avoid confusion.

It was considered in the report that the adoption of this terminology could be accomplished by amendment of the EQC Regulations, and that no amendment of the Act would be necessary. We have been informed, however, that EQC considered the recommended terminology could not be adopted in its Regulations because the Act uses the recommended terminology solely with respect to EIS's meeting only state system requirements. We, therefore, suggest that the definition of Environmental "Impact Statement" be amended to recognize the distinction between draft and final EIS's.

Actions qualifying as both agency and applicant actions

The Center report called attention to an ambiguity concerning an action that would be covered by the EIS system in two ways: i) because it would use state or county lands or funds, and ii) because it would fall within one of the designated categories of actions requiring agency approvals. The report noted the decision that was recently made by the EQC in the case of such an action, that the EIS should be subject to the approval of both the agency and the governor (or a mayor). The report considered that the decision was wise, and that the responsibility for preparing the EIS in such a case should rest with the applicant. The report considered that amendment of the EIS Act would not be necessary to resolve the ambiguity.

It has since been called to our attention that HRS 343-4(g) might be interpreted to mean that if the EIS on such an action was accepted either by the governor (or a mayor) or by the agency, no further acceptance would be necessary.

To prevent such interpretation, we recommend that HRS 343-4[(d)] (e) (p. 12, ls. 9-14) be amended to confirm EQC's resolution of the ambiguity.

HB 2890-78 (continued)

Appeals to EQC

HB 2890 proposes to enlarge the provisions of the EIS Act for appeals to the EQC. The Act already calls upon the EQC to provide in its Regulations for an appeal by an applicant concerning a determination by an agency (HRS 343-5(4)) (p. 14, ls. 12-13). The Regulations provide for an appeal by an applicant concerning an agency determination that his EIS was not acceptable. The Regulations do not provide for an appeal by an applicant concerning an agency determination, upon assessment, that an EIS was required. The Center report recommended that the Regulations provide for this latter type of appeal and, further, that the provisions for appeals on agency determinations should include also appeals by concerned parties of determinations that EIS's are not required. The amendment proposed by HB 2890 would not only allow such decisions, even though by the governor or by a mayor. This was not intended in the Center report.

In considering provisions for appeals to the EQC, four cases should be considered separately:

- i) Appeals on agency assessment determinations (Negative Declarations or EIS Preparation Notices) concerning agency actions. The Center report did not deal with these, but HB 1999-78 would provide that the EQC must approve all such agency determinations and HB 2349-78 would provide the OEQC with the same power. The power-centralization issue involved is addressed in our comments on those bills.
- ii) Appeals on agency assessment determinations (Negative Declarations and EIS Preparation Notices) concerning applicant actions. The Center report suggested that not only applicants but other concerned parties be allowed to make such appeals.
- iii) Appeals on EIS acceptability determinations by the governor and the mayor. The Center report did not deal with these, and we consider it unwise that the EQC should have the power to overrule the governor or a mayor.
- iv) Appeals on EIS acceptability decisions by agencies. The Center report did not deal with these, but we understand that in a series of EIS workshops sponsored by the Sea Grant program of the University, considerable public sentiment was expressed that the provision for appeal to the EQC by an applicant concerning an agency determination that his EIS was not acceptable should be balanced by a provision that any concerned party be able to appeal to the EQC an agency determination that an applicant's EIS was acceptable. The balance seems appropriate.

HB 2890-78 (continued)

The amendment of the provision for appeals to the EQC in HB 2890 (HRS 343-5 (4)) (p. 14, ls. 12-13) should be revised, but the revision might take either of two forms:

Alternative A--Balancing the provision for applicant appeals by a provision for appeals by other parties only in the case of EIS-requirement determinations by agencies. This would require revision of the Act's requirement regarding incorporation of appeal provisions in the EIS Regulations alone; or

Alternative B--Balancing the provision for applicant appeals not only in the above case but also in the case of EIS-acceptability determination by agencies.

If Alternative B is favored, there should be not only revision of the requirement regarding incorporation of appeal provisions in the EIS Regulations, but also revision of the provision regarding acceptances of EIS's on applicant actions (last paragraph of HRS 343-4(c)) (p. 11, ls. 6-16), and, to require exhaustion of administrative remedies before recourse is made to the courts, revisions of the provision regarding judicial appeals concerning acceptance decisions (HRS 343-6(c)) (p. 17, l. 17--p. 18, l. 5).

The choice between the two alternatives represents a subjective judgment on which the Center cannot advise.

APPENDIX A: HB 125-77

HB 125

General statement

(from Env. Ctr. RL:0194, 8 Feb 1977, pp 2-3)

This bill is essentially identical to HB 2012, HD 1 (1976) which the Environmental Center reviewed last year (RL 0184). More substantial review is now possible. We summarize here the most important effects that would result from the amendments of the EIS Act that are proposed in the bill, and provide detailed comments in Appendix A.

Principal Improvements

In general, the amendments proposed are appropriate. In particular, improvements in the EIS system would result from the amendments to the following subsections of the Act:

343-1(3)	343-4(f)
343-4 (introduction)	343-4(g)
343-4(a) (3) [old 343 b (B)]	343-5(3)
343-4(a) (6) [old 343 b (E)]	343-6(c)

Some of the provisions merit special comment, especially the few that may weaken the EIS system in some particulars.

Address to economics and social effects

The proposed amendment of the definition of an EIS [343-1(8)] would delete the requirement that an EIS address economic and social effects, yet the proposed amendment of the definition of "significant effect" in 343-1(10) would add economic and social effects to those included. The consequence would be that a significant economic or social effect would result in requiring an EIS for an action, but the EIS would not address the economic or social effect. We suggest that the language regarding economic and social effects be retained in the definition of an EIS.

Significant effects as criteria for EIS requirement

The proposed amendment of the introduction to subsection 343-4(a) is one we have noted as representing a particular improvement. It would eliminate a present incompatibility between the circumstances under which EIS's are required in this subsection [343-4(a)] and the provisions for their handling in 343-4(c). Further consistency suggests the desirability of a revision of the amendment to substitute the clause "which may have significant environmental effects" for the clause "which will probably have significant environmental effects." The wording "may have a significant effect on the environment" is used in subsection 343-4(b) and in subsection 343-4(c). The effect of the further revision would be to require an EIS that would determine the probability of a significant effect, if such an effect were only suspected initially.

Additions to classes of acting requiring EIS's

Two notable additions would be made by the proposed amendments to the classes of action requiring EIS's: actions within the Special Management

areas established under the Shoreline Protection Act (HRS Chapter 205-A, II) (by amendment in subsection 343-4(a)(3)); and actions within other county historic, cultural, and scenic districts, besides the Diamond Head HCS district (by amendment in subsection 343-4(a)(5)). In adding the latter, however, the proposed amendment of subsection 343-4(a)(5) would delete the present requirement for EIS's for actions within the Waikiki portion of the development plan for the Kalia, Waikiki, and Diamond Head area, because Waikiki is not within an HCS district. This deletion may not have been intended.

Acceptance of agency EIS's

The proposed amendment of the provision for acceptance of EIS's in 343-4(b)(1) could be construed as allowing a state agency to accept its own EIS on an action it proposes. This was probably not intended, and in any case would be unwise.

Detailed Comments

(from Env. Ctr. RL:0194, 8 Feb 1977, appendix A)

Proposed amendments to subsections of 343-1. Definitions

"(1) Acceptance" (p. 1, ls. 6-13):

This appears to be primarily a housekeeping amendment.

"(3) Agency" (p. 1, 1.1 to p. 2, 1.5):

By eliminating the restrictions to units of the executive branch of the government, the amendment would include county councils among bodies charged with environmental assessment under 341-4(c). With respect to certain actions, this amendment would eliminate inconsistencies in the application of the EIS law between counties in which an executive agency has the final approval power, and those in which the final approval must be given by the County Council. However, the proposed new definition of agency would include the courts and other judiciary agencies, which was probably not intended.

[New] "(5) Approval" and [New] "7. Discretionary".

The continuation of these new subsections would limit the approvals that determine environmental assessment responsibility to those that are of a discretionary character, as distinct from those of a ministerial character. The definition of ministerial, included in the definition of "discretionary" (p. 2, 1. 18), would be greatly improved by the addition of the phrase "without personal judgment." The grammatical construction in the proposed subsection defining "discretionary" needs correction.

These amendments have been stimulated by the issue of the possible applicability of EIS system to a private project meeting all other criteria for requiring an EIS, but requiring, in the way of governmental approval, only a building permit.

Certainly the environmental assessment of a project subject solely to a certification that certain definitive and objective standards have been met

in its design would be of little benefit. Even if the assessments were to indicate some very detrimental environmental impact, not covered by any of the applicable standards, the governmental approval could not be withheld, and the only possible benefit of the assessment would be its inducement of the applicant himself not to undertake the project because of its detrimental impact.

Hence, even if amendments proposed are appropriate, the extent to which they should be considered to exempt from environmental assessment requirements those private projects that require only building permits is questionable. The issuance of a building permit by a County Building Department signifies that the proposed construction will meet certain standards such as structural, electrical, and plumbing standards whose enforcement is the responsibility of the Building Department. It also signifies that the proposed construction will meet health standards imposed by the State Department of Health, and may be provided, as needed by services such as water supply, sewerage drainage, and fire protection, that are provided by or subject to the supervision of other county agencies.

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If all of the many applicable standards in the several applicable codes are clearly met in the construction plans for a project, the issuance of the building permit is clearly non-discretionary, and there would be little point to requiring an environmental assessment. However, room for judgment is provided even in some of the codes. For example, the Honolulu Building Code provides for variances from the Code's strict interpretation, and the Electrical Code provides for appeals from interpretations of the Building Superintendent. In practice, judgment is used even more extensively. Reviews of environmental impact statements (though not statements required on the basis of a building permit) have indicated approvals, by one agency or another, of plans that are not strictly in conformity with standards and, specifically, not in conformity with environmental standards.

It would be very difficult to prescribe in advance which building permit issuances will involve significant judgments with regard to environmental standards; and it would be absurd to subject all projects that need building permits, and that meet other criteria for the requirement, to the environmental assessment requirement. Hence, perhaps the passage of the proposed amendments is appropriate. However, a Building Department should feel free to make an environmental assessment of a project requiring a building permit if significant environmental judgment is involved, and if appropriate to issue an EIS Preparation Notice; and the possibility of an appeal to the courts to require the assessment in such a case should be recognized.

"(8) [old 6]" (p. 2, l. 19--p. 3, l. 6) Environmental Statement":

This amendment appears intended as a housekeeping measure, certain topics being transferred to new subsection 10. However, it should be noted that the only requirements as to the content of an EIS in the EIS law are in this subsection, the content prescriptions being left otherwise to the EQC under 343-5(1). The transfer would remove, from the law, the requirement for discussion of certain topics whose importance is the reason for requiring EIS's under 343-4 and 343-1(8) or new 343-1(10). These topics are: i) "the economic and social effects of an action," and ii) "the effects of economic activities arising out of the action."

Public concern with the physical and non-biological effects of an action relate mainly to the human implications of these effects.

These implications are social and economic (or social including economic). This has been made clear by federal court decisions concerning the EIS requirements under the National Environmental Policy Act, which are phrased in the act itself without reference to social and economic impacts. To strip from EIS's the discussion of the social and economic implications of environmental impacts would destroy their principal utility.

On the other hand, our capabilities to predict those social impacts of an action that do not ensue primarily from changes in the natural environment are much more limited than our capabilities to predict natural environmental impacts.

From a single action, a number of alternative economic activities may ensue. It may often be very difficult to foresee the range of such activities, and hence even more difficult to foresee the environmental impacts of those activities. However, these indirect impacts may be among most important secondary effects of the original action, and it would seriously reduce the effectiveness of the EIS system if no discussion of such indirect impacts is required in the EIS's.

It should be noted that other amendments of the EIS law that are being considered or have been considered would extend, not limit, the requirement for discussion of social, economic, and indirect impacts. There can be no question that more consideration of such impacts should be given to the more fundamental planning decisions of the State and counties, as would be provided in some proposals. The only question is whether an EIS document, designed originally to pertain to a discrete project, is the best means of providing for such consideration.

The proposed amendment of this subsection appears unwise, at least in its present form, and should be thoroughly reconsidered.

[New] (10) [old (8)] (p. 3, l. 18--p. 4, l. 4):

Significant environmental effect. The amendment represents an improvement. However, it should be noted that the term is used, for example, in Sec. 343-4, in the plural, and there can be no more than one sum of all environmental effects. It should also be noted that the definition does not really reflect the limitation to what is significant. The grammar could also be improved.

Proposed amendments to subsections of 343-4

(a) (Introduction) (p. 7, ls. 7-9)

The proposed amendment of the introduction and reorganization of subsection (a) is one we have noted as representing a particular improvement. It would eliminate a present incompatibility between the circumstances under which EIS's are required in subsection 343-4 (a) and the provisions for their handling in 343-4(c).

Further consistency suggests the desirability of a revision of the amendment to substitute the clause "which may have significant environmental

effects" for the clause "which will probably have significant environmental effects." The wording "may have a significant effect on the environment" is used in subsection 343-4(b) and in subsection 343-4 (c). The effect of the proposed revision would be to require an EIS to determine the probability of significant effects. even if such effects were only suspected initially. An attractive refinement, which has been suggested by the EQC, would incorporate in the EIS law the two-stage procedure by which the degree of likelihood of significant impacts is successively appraised: first, through an "assessment"; and then, if necessary, in a formal EIS. Unfortunately, the EQC suggestion appears not to have been transmitted to the Legislature.

(a) (3) [old (2) (B)] (p. 5, ls. 4-9):

The amendment of this subsection would extend EIS requirements to actions occurring within the General Management Areas, established by each county under the Shoreline Protection Act (HRS Chapt. 205-H, Part II). Considering the environmental importance assigned to these areas, the extension seems entirely appropriate.

(a) (5) [old (2) (D)] (p. 5, l. 17--p. 6, l. 5):

A-3
The amendment of this subsection would extend EIS requirements to actions within other county historic, cultural and scenic districts, besides the Diamond Head HCS district. In providing the extension, however, the proposed amendment would delete the present requirement for EIS's for actions within the Waikiki portion of the development plan for the Kalia, Waikiki and Diamond Head area, because Waikiki is not within an HCS district. This deletion may not have been intended.

(a) (6) [old (2) (E)] (p. 6, ls. 6-20):

This amendment would remedy a defect of the present EIS law whereby an action requiring an amendment of a county general plan would require an EIS only if the amendment were proposed by a private party, but not if the same amendment were proposed by an officer of the county at the request of the private party.

(b) The amendments proposed in this subsection would have three effects.

- i) The housekeeping effect of certain of the amendments (p. 6, ls. 23-24; and p. 8, l. 9) would be useful.
- ii) The effect of the amendment of the acceptance power in the case of state actions (p. 8, ls. 1-3) is not clear. It might be to give state agencies the power to accept their own EIS's, which would be most undesirable. It might be to give the governor the acceptance power over EIS's that pertain, not only to actions that will use State lands and funds (category (1) of sec. 343-4(a) as revised), but those that fall within categories (2) to (6) of subsection 343-4(a) as revised. If the latter is intended, the wording to be added should be revised to: or whenever a state agency proposes an action within the categories (2) to (6) in subsection (a)."

- iii) The effect of the amendment of the acceptance power in the case of county actions (p. 8, l. 5) would appear to make acceptance of an EIS by both the governor and the mayor necessary if an action required the use of both state and county lands or funds).

An action requiring a combination of state lands or funds and county lands or funds cannot proceed without the approval of both the state and the county. The implication, then, may be that the EIS on such a joint action must be acceptable to both the governor and the mayor. However, the EIS should be as nearly an objective statement as possible, and if the governor vetoes a project approved by the county or the mayor vetoes a project approved by the state, the veto should be based squarely on the overall merits of the project. Neither the mayor nor the governor should be tempted to conceal his value judgment as to these overall merits through non-acceptance of the EIS.

It would seem proper to limit the power of acceptance of the EIS's on such an action to the governor alone, as in the present law.

(c) Some of the amendments of this subsection are proposed for consistency with other amendment (or as housekeeping measures). The reference to the exemption lists of 343-5, for example, is a useful addition (p. 8, ls. 19-20).

The recognition of the need for supplemental EIS's for some actions (p. 9, ls. 7-14) is a more substantial improvement, incorporating in the law provisions already made in the EQC regulations. However, it should not be necessary to require a supplemental EIS for each phase of the approval process. The initial EIS should, so far as is possible address the concerns that will be faced in the subsequent approval phases, and a supplemental EIS should be required only if there are significant changes in the action or set of actions proposed, if the circumstances under which these actions would be undertaken change, or if new evidence as to environmental impacts comes to light.

(f) The amendment of this subsection (p. 11, l. 12) substituting "acceptance" for "approval" of an EIS represents clarification consistent with the terminology used elsewhere in the Act.

The deletion of the provision for submission of an EIS that is required under both the State Act and NEPA to the EQC for public review (p. 11, ls. 7-11) seems of no importance because, if the EIS is required under this Act, it would be processed in accordance with the requirements of the Act.

The deletion of the word "only" in p. 11, l. 17 introduces the same overlap of authority between the governor and the mayor that has been commented on in connection with subsection (b).

Proposed amendments to Sec. 343-5. Rules and Regulations.

(3) (p. 12, ls. 15-17): The substitution of "acceptance" for "approval" of an EIS is consistent with usage elsewhere in the Act, and an improvement [old] (7). (p. 12, ls. 6-12). Old subsec. 7 is redundant to subsec. (6) and should be deleted as proposed.

APPENDIX B: HB 368-77

HB 368

(Detailed comments from Env. Ctr. RL:0194, 8 Feb 1977, appendix B)

This bill would delete, from the present prescription for EIS's on actions using Conservation District lands, the limitation that an EIS is required only if the action will have significant environmental effects. The rationale presented is that such broad exemption, by class, of actions in the conservation district is possible under the present Act as to negate the effectiveness of the Act.

In reviewing types of action proposed by agencies for exemption under the exempt classes provided in the EQC regulations, the Environmental Center has found many that are so broadly defined that they would include actions that will have significant detrimental environmental impacts. Most of the exempt types have, however, been more satisfactorily redefined before approval by the EQC. To reduce the problem of improper breadth of definition, the Center has recommended applying the assessment process that has been prescribed by EQC for individual actions to proposals for exemption.

The EIS system is intended to identify, analyze, and disclose environmental impacts. There is no point to applying the system to actions that will not have significant impacts on the environment. The extension of EIS requirements, or at least assessment requirements, to actions that "may" have significant impacts, instead of those to which such impacts seem "probable" even before an EIS is proposed, would be appropriate. However, this extension would be appropriate for actions undertaken anywhere, not merely those in the conservation district.

The amendment proposed does not seem to be in accord with the objectives of the EIS Act.

APPENDIX C: HB586-78

HB 586

(Detailed comments from Env. Ctr. RL:0194, appendix C)

This bill would delete all of the prescriptions in the present EIS Act as to the kinds of private actions for which EIS's are required, and replace them by a provision that each county may determine what actions in that county may require EIS's, so long as the actions will probably have significant environmental effects.

It should be noted that this would permit the counties to determine which private actions proposed in certain areas will require EIS's, even if it is the need for State approval of the projects that now result in the EIS requirement. No EIS would be required for a proposed private action within the conservation district, unless a county required it, even though a Department of Land and Natural Resources permit is required for such use, and the Department relies on the information in the EIS as to the environmental effects in determining the appropriateness of the action. This would include an action proposed for an area seaward of the shoreline.

The proposed deletion would be most serious in the case of actions proposed in areas seaward of the shoreline. These are within the conservation district, but the counties could not require EIS's in such areas because they are not within county jurisdictions.

With the deletion, no EIS would be required for private uses of a historic site listed either in the National Register or the State Register, unless a county required it.

The proposed amendment would, thus seriously restrict the access of State, as well as county agencies, to information on the environmental effects of actions subject to their approvals unless the counties chose to require the provision of such information through EIS's, and the requirement could not make the requirement for actions seaward of the shoreline.

The City and County of Honolulu has, it should be noted, mandated the preparation and review of EIS's for projects proposed in the Special Management Area established under the interim Shoreline Protection Act, even though these EIS's are not required under the State EIS law. It would, thus, be possible for the counties not only to adopt the same requirements as to EIS's as in the present State law, but to extend them even without special legislation provision. There is no assurance that the counties will do so, however, and there will inevitably be a delay before they could adopt the ordinances required. In the meantime, except as provided within the Special Management Area of Oahu, decisions with respect to private actions would have to be made without adequate information as to their environmental implications, as was the case prior to the passage of the EIS law.

It would be possible, of course, to extend explicitly to the counties the power to require EIS's more extensively than is provided in the present State law without weakening the present State law.

Proposed amendments to Sec. 343-6. Limitations of actions.

(a) and (b) (p. 13, l. 21--p. 14, l. 13):

The amendments appear to be appropriate housekeeping ones.

(c) The amendment (p. 14, ls. 18-23) to permit the EQC to be a party in a judicial action concerning the acceptability of an EIS is an appropriate one.

The amendment (p. 15, l. 1) deleting the restriction that a plaintiff may contest an issue, only if that plaintiff has previously discussed that specific issue in the review process, is clearly a wise one. A person may have no knowledge of an impact that may of direct concern to him until after the review process is completed.

APPENDIX D

SUGGESTED ALTERNATIVES AND ADDITIONS TO AMENDMENTS PROPOSED IN HB 2890-78

Findings and purposes

Revise section 1 of HB 2890 so as to incorporate the statement of findings and purpose that it provides as section 1 of HRS Chapter 343, and renumber all present sections of HRS accordingly.

Actions covered by the EIS system

Actions proposing county general plan amendments

Alternative A: Amend HRS 343-4(a) [(2)(E)] (8) as in HB 2890,

Alternative B: Delete HRS 343-4(a)(E) and renumber remaining subsections of HRS 343-4(a) accordingly,

Actions in the Capitol site

Revise HRS 343-4(a) (7), proposed in HB 2890, as follows:

- (7) Propose any use within the area designated as the site of the State Capitol or on the grounds of Iolani Palace as designated in Chapter 6E.

Actions in historic sites

Alternative A: Amend HRS 343-4(a) [(2)(C)] (4) as in HB 2890;

Alternative B: Revise amendment of HRS 343-4(a) [(2)(C)] 4 as follows:

- (4) Propose [(C) All actions proposing] any use within any historic site as designated in the National Register or Hawaii Register as provided for the Historic Preservation Act of 1966, Public Law 89-665 or Chapter 6E of the Hawaii Revised Statutes, [which will

probably have significant environmental effects] or
within 100 yards of such site providing the action will
have a significant environmental effect on the site.

Actions in Agricultural Land Use District

Alternative A: Add HRS-4(a)(6) and (10) as in HB 2890.

Alternative B: Substitute the following amendments for HRS-4(a)(6) and (10):

- (6) Propose any non-agricultural use of prime agricultural land or unique agricultural land included in the agricultural district by the State Land Use Commission under Chapter 205.
- (7) Propose reassignment to some other district of prime agricultural land or unique agricultural land included in the agricultural district by the State Land Use Commission under Chapter 205.

Alternative C: Substitute the following amendments for HRS-4(a)(6) and (10):

- (6) Propose any use of land included in the agricultural district by the State Land Use Commission under Chapter 205 that will require a special use permit.
- (7) Propose reassignment to some other district of any land included in the agricultural district by the State Land Use Commission under Chapter 205.

Water developments

Insert between HRS 343-~~4~~5~~7~~(2)E~~7~~(8) and (9), proposed in the HB 2890, the following section, and renumber succeeding subsections accordingly:

- (9) Propose any new or expanded water development.

EIS Terminology

Revise amendment of HRS 343-1[(6)]2, proposed in HB 2890, as follows:

[(6)](7) 'Environmental impact statement' or 'statement' means an informational document, draft or final, prepared in compliance with [applicable] the rules and regulations promulgated under section 343-5 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

Actions qualifying as both agency and applicant actions

Amend HRS 343-4[(d)](e) to read:

- (1) Whenever an applicant simultaneously requests approval from two or more agencies and there is a question as to which agency has responsibility of complying with subsection (c) with respect to a particular action, the commission, after consultation with the agencies involved, shall determine which agency is responsible.
- (2) Whenever an action that is proposed by an applicant will also require the use of state or county lands or the use of state and county funds, the assessment, and the

statement, if required, shall be prepared in accordance with subsection (c); and the statement shall be subject to acceptance in accordance with both subsection (b) and subsection (c).

Appeals to EQC

Alternative A: Revise amendment of HRS 343-5(4), proposed by HB 2890, to read:

Prescribe procedures for the applicant to appeal [a determination] to the environmental quality commission concerning a determination as to the acceptability of the statement on an action proposed by the applicant and for any appeal to the commission concerning a determination whether a statement is needed.

Alternative B: Amend last paragraph of HRS 343-4(c) to read:

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant may, within sixty days after nonacceptance of a statement by an agency, appeal the nonacceptance to the environmental quality commission[, which]. Any party who has provided written comments on the statement during the designated review period may, within ____ days after acceptance of a statement by an agency, appeal the acceptance decision to the commission. The commission shall promptly notify the applicant of such an appeal, and shall allow ____ days for the applicant to respond. The commission shall, within thirty days of receipt of [the] an appeal by an applicant or of receipt of the applicant's response to an appeal by

another party, notify the appealing party and the applicant of its determination. In any affirmation or reversal of an appealed acceptance or nonacceptance, the commission shall provide the applicant, the appealing party, and the agency with specific findings and reasons for its determination. The agency shall abide by the commission's decisions.

Revise amendment of HRS 343-5(4) proposed by HB 2890 to read:

Prescribe procedures for [the applicant to appeal a determination] appeal to the environmental quality commission concerning the acceptance or nonacceptance of a statement in accordance with section 343-4(c), and for an appeal to the commission concerning a determination whether a statement is needed for an action.

If, however, provision is made for appeal to the commission concerning an EIS acceptance determination, it would seem appropriate that such an administrative appeal should be exhausted before recourse is made to the courts.

Revised amendment of HRS 343-6 is proposed by HB 2890 to read:

No judicial proceeding, the subject of which is the acceptability of an applicant's statement shall be initiated unless the acceptability determination is first appealed to the commission in accordance with section 343-4(c).
Any such judicial proceeding shall be initiated within thirty days after the Commission has rendered its decision, and
Any other judicial proceeding, the subject of which is the

acceptability of a statement, shall be initiated within sixty days after the public has been informed pursuant to section 343-2 of the acceptance of such statement[; provided that only]. The commission, the applicant, affected agencies, or persons who will be aggrieved by a proposed action and who provided written comments to such statements during the designated review period shall have standing to file suit; further provided that contestable issues by the commission are unlimited, and those of any other party shall be limited to issues identified and discussed [by the plaintiff] in the written comments.